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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of)

Implementation of Section 309(j))

of the Communications Act)

-- Competitive Bidding for Commercial)

Broadcast and Instructional Television)

Fixed Service Licenses)

Reexamination of the Policy)

Statement on Comparative)

Broadcast Hearings)

Proposals to Reform the Commission's)

Comparative Hearing Process to)

Expedite the Resolution of Cases)

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

To: The Commission

REPLY COMMENTS OF **DUHAMEL BROADCASTING ENTERPRISES**

DUHAMEL BROADCASTING
ENTERPRISES

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Summary

Duhamel Broadcasting Enterprises supports the comments of other participants in this proceeding who have taken the position that the Commission should not apply auction procedures to applications in the FM translator service. The Commission does not have the authority to use auction procedures for FM translators. Even if the Commission did have such authority, it would be an abuse of FCC discretion to implement auctions for these services. Auctions would be detrimental to the service and inconsistent with the objectives that Congress has required to be advanced whenever auction procedures are utilized. Furthermore, the use of auctions for FM translator services would be contrary to the public interest, since little revenue would be generated, and the only result would be loss of important service to the public, particularly in underserved, rural areas. Should the Commission nevertheless adopt the auction system in connection with the issuance of initial construction permits in the FM translator service, it should establish procedures that permit FM translators forced off the air by full service FM stations to relocate to a new frequency without being subject to the auction process.

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To: The Commission

**REPLY COMMENTS OF
DUHAMEL BROADCASTING ENTERPRISES**

Introduction

1. Duhamel Broadcasting Enterprises ("Duhamel"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its reply comments in the above-captioned proceeding to express its support for the comments of other participants in this proceeding who have taken the position that the Commission should not apply auction procedures to applications in the FM translator service. For

example, Duhamel is in agreement with the Comments of Six Video Broadcast Licensees (The Board of County Commissioners of Monroe County, Florida, Chambers Communications Corp., Island Broadcasting Co., Prime Time Christian Broadcasting, Inc., Sage Broadcasting Corporation, and Selective TV, Inc.) in their statement that they “strongly oppose the possibility of applying auction procedures to TV, LPTV, and translator major or minor modification applications.”^{1/} Similarly, Duhamel supports the Association for Community Education which took the position that “[m]ajor change applications to rectify the impending loss of an existing FM translator should not be subject to the auction process and time delays caused by soliciting competitive bids.”^{2/} Finally, Duhamel agrees with National Public Radio, Inc., the National Federation of Community Broadcasters, and the Corporation for Public Broadcasting which pointed out the fact that “[i]f public broadcasters must participate in auctions every time they are forced to relocate a translator, there could be a downward spiral in the coverage of public radio and, hence, a silencing of diverse programming in many parts of the country.”^{3/}

2. The Commission should not use the auction procedure for initial or modification authorizations in the FM translator service. The Commission does not have the authority to use auction procedures designed for use in primary, full power broadcast services for FM translators. Even if the Commission did have such authority, it would be

^{1/} *Comments of Six Video Broadcast Licensees*, at 5.

^{2/} *Comments of the Association for Community Education*, at 4.

^{3/} *Comments of National Public Radio, Inc., National Federation of Community Broadcasters, and the Corporation for Public Broadcasting*, at 12.

an abuse of FCC discretion to implement auctions for these services, since, upon examination it becomes clear that auctions will be detrimental to the service and inconsistent with the objectives that Congress has *required* to be advanced whenever auction procedures are utilized. If auctions were utilized, there would be no robust competitive bidding for initial or modified permits for these facilities, since their secondary status undercuts their “monetary” value. The only result would be loss of important service to the public, particularly in underserved, rural areas. Given this detriment to public service, the only public interest purpose that could be advanced as a reason for using auctions would be the generation of revenue. This rationale would be based on a faulty principle as little, if any, revenue would be generated from such auctions. More importantly, however, the rationale is one which Congress has expressly *prohibited* the FCC from considering when determining whether or not to hold auctions. Should the Commission nevertheless adopt the auction system in connection with the issuance of initial construction permits in the FM translator service, it should establish procedures that permit FM translators forced off the air by full service FM stations to relocate to a new frequency without being subject to the auction process.

3. Duhamel is the licensee of radio and television stations in Rapid City, South Dakota, and the vast rural areas surrounding it, stretching to include Scottsbluff, Nebraska, and Sheridan, Wyoming. In connection with its FM station, KDDX(FM), Spearfish, South Dakota, Duhamel operates two “fill-in” translators, K276CQ, Rapid City, South Dakota, and K276IJ, Spearfish, South Dakota. Due to the uneven terrain of the Black Hills of southwestern South Dakota, these translators are crucial to the ability

of the public residing within the principle community contour of the station to receive Duhamel's service. Both translators were forced off the air last fall when full power FM station KYDT, Sundance, Wyoming commenced operations on their frequency at the same time as the Commission announced its freeze on the filing of major modification applications in connection with this proceeding. Currently, the residents served by those translators are without Duhamel's service while Duhamel waits for the resolution of this proceeding. Duhamel and the listeners it serves will be directly affected by the Commission's ruling in this matter, thus Duhamel has the requisite standing to participate in this proceeding.

Argument

A. The Commission Lacks Statutory Authority to Auction Authorizations in the FM Translator Service

4. In this proceeding, the Commission seeks comments on the implementation of the congressionally mandated competitive bidding procedures for mutually exclusive applications. While such auctions are the method chosen by Congress to resolve mutually exclusive applications for initial authorizations in the full-power broadcast services, they are not authorized for secondary services nor for modifications of existing services.

5. FM translators are not mentioned in the Balanced Budget Act of 1997 (the “Act”).^{4/} Thus, no explicit authority is given to use auctions in connection with FM translator authorizations. Therefore, Duhamel agrees with the Commission’s tentative conclusion in the Notice of Proposed Rule Making (“NPRM”)^{5/} that the Congressional mandate to adopt auctions was meant to encompass only full-service commercial radio or television station applications.^{6/}

6. In any event, the Act did not intend the Commission to use auctions for modification applications. The language of the statute clearly indicates that auctions are to be used for “any initial license or construction permit.”^{7/} There is nothing in the Balanced Budget Act or its legislative history that indicates that Congress intended the Commission to resort to auctions in the case of modifications of facilities.

^{4/} Pub. L. No. 105-33, 111 Stat 251 (1997). The legislative history of the Act does, however, refer to “applications for secondary broadcast services such as low power television, television translators, and television booster stations.” H.R. Conf. Rep. No. 105-217 (1st Sess.) (1997) at 1266.

^{5/} *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases, Notice of Proposed Rule Making*, MM Docket No. 97-182, GC Docket No. 92-52, GEN Docket No. 90-264, FCC 97-397 (November 26, 1997) (“NPRM”).

^{6/} *NPRM* at ¶ 40.

^{7/} Pub. L. No. 105-33, 111 Stat 251 (1997).

B. Assuming Arguendo that the FCC Has Statutory Authority to Do So, the Use of Auctions for FM Translator Authorizations Would be an Abuse of Commission Discretion

7. The Commission must make policies implementing auctions in observance of the objectives announced by Congress. Congress' first objective for the design of a competitive bidding system, described in the Communications Act of 1934, as amended, and unchanged by the Balanced Budget Act, is "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays."^{8/} The Commission is required to consider the objective of rapid deployment of new services in adopting these rules as its decision would be arbitrary and capricious if it fails to consider Congress' intention on the matter.^{9/}

8. As is detailed further below, institution of auctions in the FM translator service would serve to delay or deny service, particularly to rural areas. FM translators are a secondary service providing little, if any, return for the licensee's investment. Therefore, broadcasters have little incentive to bid more than a nominal amount to offer FM translator service, and few new FM translators will be built. Listeners unable to receive full-power signals would be left without service. Thus, service to rural communities would be delayed or terminated if the Commission adopts the auction

^{8/} 47 U.S.C. § 309(j)(3).

^{9/} *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 44 (1983).

methodology for FM translator service. In the case of modifications, service would be restored far more rapidly by allowing displaced FM translators to file minor modification applications as recommended herein, rather than proceed to auctions. Accordingly, a decision to initiate auctions in these cases would most harm those communities to which Congress intended to speed service and would therefore be arbitrary and capricious.

9. Given that less service to rural communities is likely to be the result of auctions for FM translators, the only conceivable reason the FCC would have for using the auction system for such applications is to generate revenues through the auction process. A decision based on this rationale, however, would also be arbitrary and capricious. Congress expressly stated that “the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.”^{10/} Commission policy may not be grounded upon a rationale expressly forbidden by Congress.^{11/} Therefore, initiation of auctions in the FM transaction service would be an abuse of FCC’s discretion in this area.

10. Moreover, where mutually exclusive applications are filed, the Commission is statutorily required to seek other means for resolving mutual exclusivity before resorting to auctions. Section 309(j)(6)(E) of the Communications Act of 1934, as amended, requires the Commission “to continue to use engineering solutions, negotiation,

^{10/} 47 C.F.R. § 309(j)(7)(A).

^{11/} *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 44 (1983).

threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.”^{12/} Not only did Congress choose not to change this provision of the Communications Act when it passed the Balanced Budget Act, but the Conference Committee emphasized that it was “particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.”^{13/} This analysis is particularly applicable to modification applications where such efforts are most likely to be successful and mutual exclusivity can be avoided without resort to an auction.

**C. The Use of Auctions to Resolve FM Translator Applications
Would Disserve the Public Interest**

11. FM translators are authorized solely for the purpose of retransmitting the signals of full service broadcast stations to areas where the direct reception of those primary broadcasts is unavailable.^{14/} These translators may either provide “fill-in service” within the primary station’s contour where reception is not otherwise possible because of distance or terrain, or “other area service” to bring the signals of primary

^{12/} 47 U.S.C. § 309(j)(6)(E).

^{13/} Pub. L. No. 105-33, 111 Stat 251 (1997) (*Conference Agreement, Section 3002(A) -- Extension and Expansion of Auction Authority*).

^{14/} 47 C.F.R. §§ 74.1231(a) and (c).

stations to rural areas that are lacking in radio services due to their remote location or unusual topography.^{15/} In either case, these stations provide such communities with vital weather forecasts, severe weather warnings, emergency broadcasts, as well as entertainment, news, and public affairs programming that might be otherwise unavailable.

12. While technically not “noncommercial” broadcasters, FM translators are rarely financially profitable.^{16/} Local origination by translators is limited to 30 seconds per hour to acknowledge financial support of the station and emergency messages.^{17/} Fill-in translators may be licensed to the licensee of the primary station or to third parties receiving support from the primary station licensee.^{18/} Given the nature of the service they provide, primary stations view the service provided by fill-in translators as part of the primary station’s obligation to reach the listeners within the primary station’s protected contour. Thus, these stations have no economic value apart from their primary station. Translators providing other-area service, in contrast, *must* be licensed to third parties having no connection to the primary station and may not receive any support from

^{15/} See 47 C.F.R. § 74.1201.

^{16/} The Commission has recognized the limited commercial revenue from translators: “These translator licenses, as a whole, are different from other classes of commercial regulatees because they have no advertising revenue and usually have no mechanism for enforcing payment from members of the public who benefit from their services.” *Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 10 FCC Rcd 12759, 78 RR 2d 210, ¶ 16 (1995).

^{17/} 47 C.F.R. § 74.1232(g).

^{18/} 47 C.F.R. § 74.1232.

the primary station.^{19/} These stations are often funded by individual residents of communities who are anxious to receive radio services that are not otherwise available.

13. The Commission's rules require that an FM translator cease operations if it causes unacceptable interference to any primary broadcast service.^{20/} Thus, operation of an FM translator is a very tenuous proposition, since it may be required to shut down at any time. Moreover, FM translators can be bumped from their frequencies without notice, and have no rights to another "displacement" frequency. As a result of their meager operating budgets and the uncertainty of their future operations, licenses to operate FM translators are not generally considered valuable in the broadcasting industry. Therefore, there is very little incentive for legitimate broadcasters to engage in competitive bidding for FM translator licenses. If FM translators were subject to auction, then, few if any truly interested parties would be willing to pay a premium for a service with so little future expected value. Thus, very little revenue would likely be generated

^{19/} 47 C.F.R. §§ 74.1232(d) and (e).

^{20/} Section 74.1203(a) of the Commission's Rules provides that:

[a]n authorized FM translator or booster station will not be permitted to continue to operate if it causes any actual interference to: (1) the transmission of any authorized broadcast station; or (2) the reception of the input signal of any TV translator, TV booster, FM translator or FM booster station; or (3) the direct reception by the public of the off-the-air signals of any authorized broadcast station including TV Channel 6 stations, Class D (secondary) noncommercial educational FM stations, and previously authorized and operating FM translators and FM booster stations. Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the FM translator or booster station, regardless of the quality of such reception, the strength of the signal so used, or the channel on which the protected signal is transmitted.

from the parties with a genuine interest in the services, and the only result would be further delay in delivering services to the affected communities. Nevertheless, to listeners who would be left without this service, the loss of FM translator service would be profound.

14. Moreover, the Commission itself could feel the impact of the decision to auction FM translator authorizations. Because of the tentative nature of FM translators, applicants might be unable to use the frequency for which they have paid soon after the auction. Successful bidders who are subsequently forced off the air would likely seek refunds, either from the full-service broadcasters who forced them off the air, or from the Commission. If disputes arose between FM translator licensees and full-service stations, the Commission would be put in the undesirable position of resolving such disputes, adding to the administrative workload of the Commission. If the bidders seek relief from the Commission itself, the Commission may be required to refund the money paid by the displaced broadcasters in the auction process. Fairness dictates that the Commission could not keep the money paid for an unavailable channel in such a case. Moreover, a decision to keep the money paid by an applicant who cannot use its FM translator could even implicate the Fifth Amendment's prohibition against the taking of private property for public use without just compensation.^{21/} Thus, the implementation of auctions for FM translator applications could require refunds or expose the Commission to constitutional litigation.

^{21/} See *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986); *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978).

D. Alternatives to Auctions

15. The Commission has a number of alternative methods available that would ensure better service to isolated communities than auctions. Duhamel supports many of the solutions that have been proposed by other participants in this proceeding. In the case of applications for new services, as has been noted by several commenters, “the Commission should permit mutually exclusive applicants to amend their applications to specify different channels or transmitter sites, or make other changes, so long as no [new] mutual exclusivity or [unacceptable] interference would result.”^{22/} Such a change to Commission rules would likely avoid many mutually exclusive application conflicts.

16. Where any remaining conflicts exist, lotteries would be a particularly attractive solution. Lotteries have worked well for low power television stations. They are particularly appropriate, since they do not require applicants to pay high premiums for what might turn out to be nothing.^{23/} Further, lotteries would proceed more quickly than auctions, thus speeding service to isolated communities.

17. In the case of modification applications for FM translators that have been forced off the air to avoid interference with a primary station, the Commission should adopt displacement rules similar to those for LPTV and TV translators. Under these

^{22/} *Comments of the National Translator Association*, at 8-9.

^{23/} Some may argue that this is true for all services for which auctions are being considered. It is the special nature of the service provided by FM translators and the detrimental impact that auctions would have on that service that dictates against the use of auctions for FM translator applications.

current rules, displaced secondary TV translator stations are permitted to apply for a new frequency in a minor, rather than major, modification application.^{24/} As a minor modification, these applications are not subject to lottery provisions and should not be subject to any newly adopted auction procedures. This way, applicants for new FM translator stations will have more incentive to invest in FM translator service, since they know that if they are displaced, they may (depending on the availability of other channels) change frequencies without facing another auction. With such a system, at least a bidder for an initial construction permit would not be spending money on an illusory item, since they would be paying for not merely the temporary use of a frequency, but displacement rights to another.

^{24/}

See 47 C.F.R. § 73.3572(a)(2).

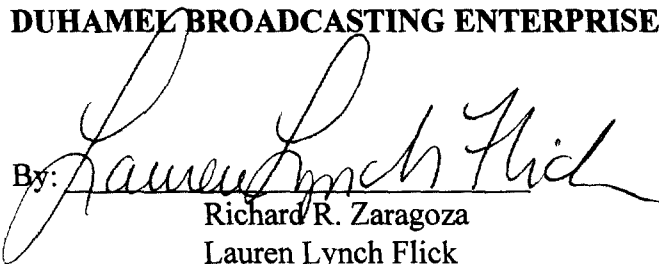
Conclusion

Based on the foregoing, Duhamel Broadcasting Enterprises respectfully urges the Commission not to adopt an auction system for modification applications for FM translator services.

Respectfully submitted,

DUHAMEL BROADCASTING ENTERPRISES

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Dated: February 17, 1998

CERTIFICATE OF SERVICE

I, Elinor W. McCormick, a secretary to the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., hereby certify that on this 17th day of February 1998, I served a true copy of the foregoing **"REPLY COMMENTS OF DUHAMEL BROADCASTING ENTERPRISES"** by first class United States Mail, postage prepaid, upon the following:

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